MOTION FILED
NOV 22 1986

(5)

No. 85-1735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LEE M. THOMAS, Administrator, Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

OUTBOARD MARINE CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT OUTBOARD MARINE CORPORATION'S RESPONSE TO THE MOTION TO VACATE

RICHARD J. PHELAN*
ROSEANN OLIVER
JAN FELDMAN
PHELAN, POPE & JOHN, LTD.
180 North Wacker Drive
Suite 500
Chicago, Illinois 60606
(312) 621-0700

RICHARD J. KISSEL
JEFFREY C. FORT
DANIEL C. O'CONNELL
MARTIN, CRAIG, CHESTER & SONNENSCHEIN
55 West Monroe Street
Chicago, Illinois 60603
(312) 368-9700

Attorneys for Respondent
(* *Counsel of Record*)

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

6 pp

TABLE OF AUTHORITIES

	PAGE
United States v. Munsingwear, 340 U.S. 36 (1950) .	2, 3
Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 104, 42 U.S.C. § 9604	1
Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 104(m) (Oct. 17, 1986)	1, 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LEE M. THOMAS, Administrator, Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

OUTBOARD MARINE CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT OUTBOARD MARINE CORPORATION'S RESPONSE TO THE MOTION TO VACATE

Petitioners have filed a motion to vacate as moot the decision of the United States Court of Appeals for the Seventh Circuit, because the provisions of the statute which the lower court interpreted, § 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9604 ("Superfund"), has been amended by § 104(m) of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (Oct. 17, 1986) ("Superfund Amendments"). Respondent Outboard Marine Corporation ("OMC") submits this response to that motion, as requested by the Court.

This matter arose after the United States obtained an ex parte warrant to begin a three and one-half year construction project on OMC's property. The warrant expressly incorporated and cited various provisions from § 104 of the original Superfund Act. OMC filed this action to enjoin the enforcement of the warrant, and it subsequently filed a motion for preliminary injunction. The district court denied the motion (Pet. App. 16a), and the Seventh Circuit reversed, holding that there was no statutory authority for the government's warrant (Pet. App. 13a-14a). The new Superfund Amendments contain different access provisions (§ 104(m)) from those in the original statute, and petitioners have represented to the Court that they will only proceed under the new legislation.

Under those circumstances, petitioners concede that the issue before this Court is now moot, and they request the Court to vacate the Seventh Circuit's ruling. OMC agrees that the present appeal is moot, but it submits that the Court should simply dismiss the petitioners' appeal before this Court.

The Seventh Circuit decision held only that the original Superfund statute did not authorize the ex parte warrant issued to the government for access to OMC's property (Pet. App. 13a-14a). That warrant expressly relied on the original statute. Leaving that ruling undisturbed will not prevent the government from proceeding under the new Superfund Amendments. With or without that ruling, if the government proceeds under the new Superfund Amendments, the district court will still have to determine the continued status of this case, which is still pending on the merits. The Seventh Circuit's ruling will have no effect on the subsequent disposition of this matter in the district court.

In *United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950), the Court held that vacating a lower court ruling

on a moot issue "clears the path for future relitigation of issues between the parties and eliminates a judgment, review of which was prevented through happenstance." The Court's concern in *Munsingwear* that the parties should be allowed to relitigate issues not reviewed is not relevant here, because the new statute presents different issues and different procedures. The Seventh Circuit's decision need not be vacated because of res judicata concerns.

Enactment of the Superfund Amendments obviates any lasting effect from the Seventh Circuit's interpretation of the original statute. For that reason, there is no justification in the facts and legal principles of this matter to vacate the Seventh Circuit's ruling. Because the issue is moot, the present appeal should be dismissed.

For the foregoing reasons, Respondent Outboard Marine Corporation respectfully requests that the Court deny the motion to vacate and dismiss the proceedings before this Court.

Respectfully submitted,

RICHARD J. PHELAN
(Counsel of Record)

Of Counsel:

PHELAN, POPE & JOHN, LTD.
180 North Wacker Drive
Chicago, Illinois 60606
(312) 621-0700

MARTIN, CRAIG, CHESTER
& SONNENSCHEIN
55 West Monroe Street
Chicago, Illinois 60603
(312) 368-9700